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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 215.

CAMPBELL SOUP COMPANY and CARNATION COMPANY, Petitioners,

v.

ARMOUR AND COMPANY, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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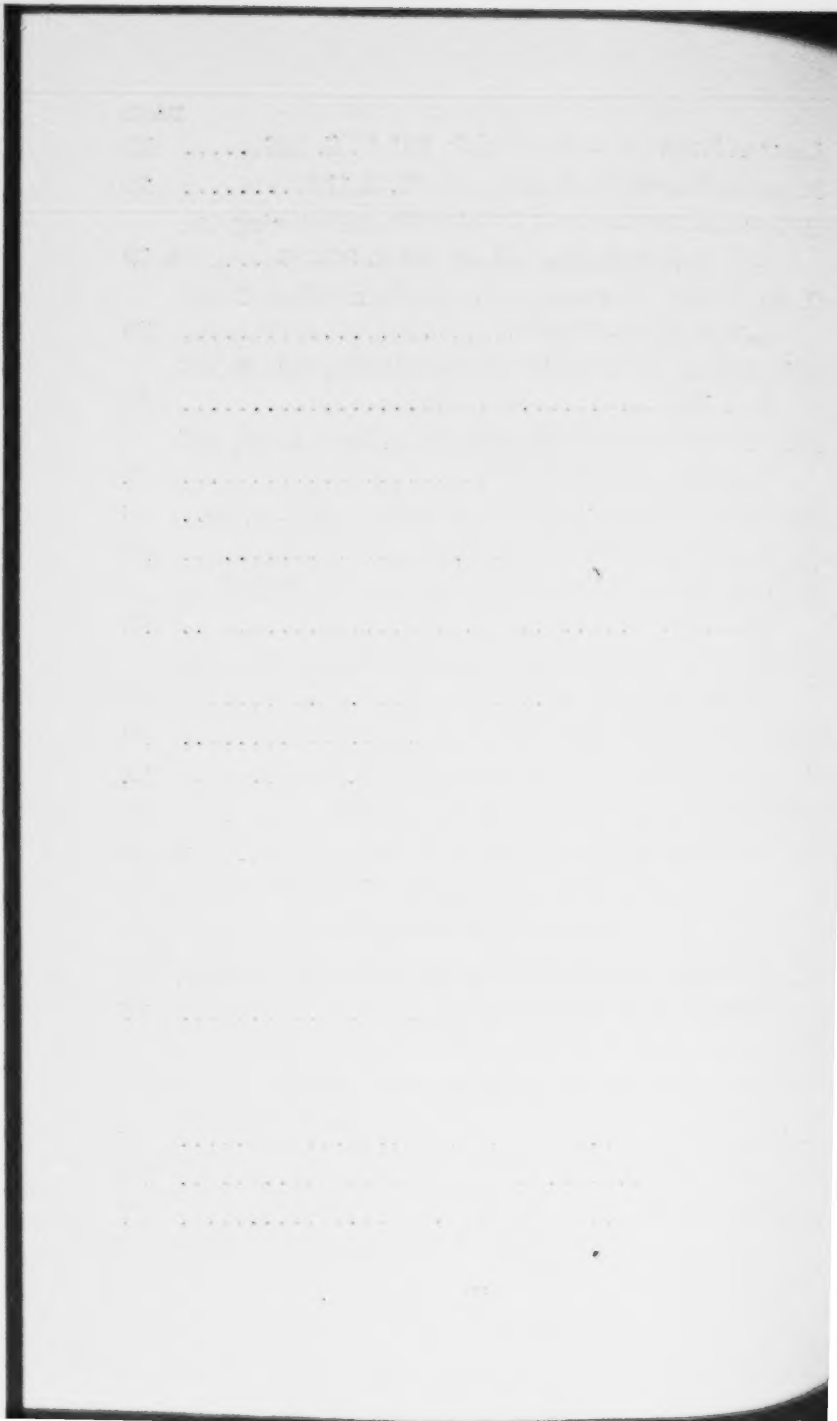


BRIEF FOR RESPONDENT
In Opposition to Petition for Writ of Certiorari.

I.

Opinions Below.

The opinion of the Court of Appeals is reported at 175 F. (2d) 795. The opinion of the District Court is reported at 81 F. Supp. 114 and is reproduced as Appendix A of this Brief (*infra*, p. 25).

Petitioner Carnation unsuccessfully litigated the identical unfair competition issue thirty-four years ago in *Pacific Coast Condensed Milk Co. v. Frye & Co.*, 147 Pac. 865; 85 Wash. 133. The opinion of the Supreme Court of Washington therein is reproduced as Appendix B of this Brief (*infra*, p. 39).

II.

Jurisdiction.

Respondent concedes that this Court has jurisdiction in the premises. It denies, however, that the issue involves the construction of the Trade-mark Act of 1905 or the Trade-mark Act of 1946, as asserted in the petition (p. 5).

III.

Counter-Statement of the Case.

Petitioners' "Statement" (Petition, pp. 2-5) contains no page references to the printed record; *cf.* Rule 27, 1(d). It ignores the fact findings of the District Court, all of which were left undisturbed by the Court of Appeals. It requires material correction and enlargement*:

(1) While petitioners charge respondent not only with "trade-mark infringement" but also with "unfair competition," the sole act complained of is respondent's use, on some of its retail food labels, of bands of white and red as background color.

(2) The District Court did *not* hold that red-and-white banding "could not lawfully be used" by both petitioners (*cf.* Petition, p. 4). To the contrary, the court was at pains to point out that it could lawfully be used

---

* The record herein includes a two-volume appendix filed by petitioners as plaintiffs-appellants in the court below (marked "Volume I" and "Volume II") and a smaller appendix filed therein by respondent as defendant-appellee. This latter also contains the opinion and judgment of the court below. For convenience we shall style it Volume III. Record references will be by a Roman numeral to designate the volume and an Arabic numeral to designate the page, thus "(I, 4a)". Where the reference is to a finding or opinion below, it will be *italicized*. Since the District Court's opinion appears in Volume II (and is reprinted, with the same record paging, as Appendix A of this brief), references to it will begin "*(II, ...)*"; the Court of Appeals' opinion, being in Volume III, is indicated by references beginning "*(III, ...)*".

by anyone, and held that it could not be jointly monopolized by petitioners.

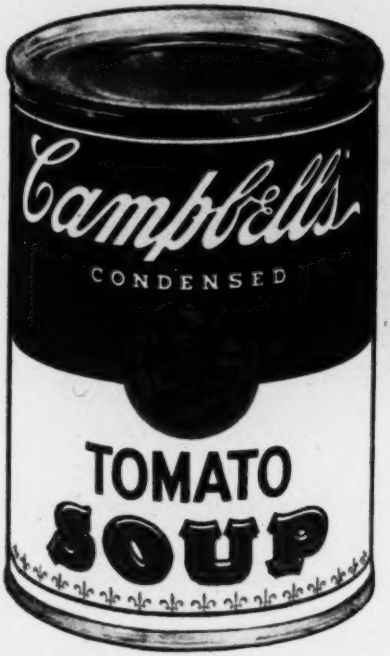
(3) The petition is bottomed on the wholly erroneous premise that red-and-white banding constitutes petitioners' "trade-mark." As will be shown in greater detail below (pp. 8-9) it is not.

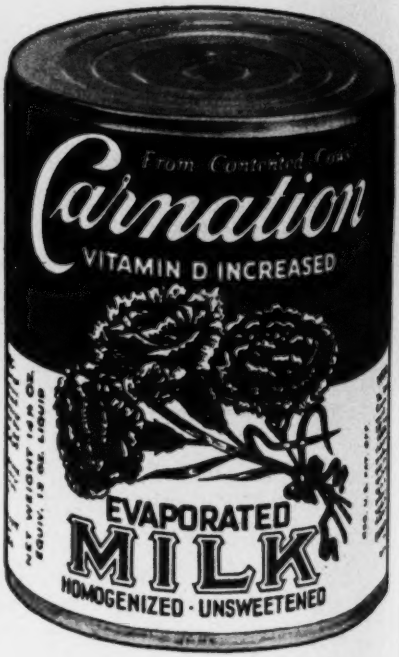
Petitioners are unrelated companies (I, 222a; II, 649a). Neither of them asserts a sole and exclusive right in red-and-white banding on food labels; petitioners assert that each of them has the right to use it. As a matter of fact both of them have used virtually identical red-and-white banding as background color on their respective labels for fifty years *(II, 1172-3a)*. Petitioners say that this causes confusion between their respective products (I, 205a, 134a), but that they have agreed to this between themselves and, in consequence, now have a "joint interest in the subject-matter of this action" (I, 9a, 178-86a).

(4) The petition asserts (p. 2) this action involves "a" registered trade-mark and that petitioners are "the owners" [plural] of "a" [singular] "federally registered device trademark * * *." The fact is that the two petitioners hold and rely in this action upon separate and distinct registrations (I, 6a, 8a, 23-31a, 39-41a).

(5) The illustrations on pages 2 and 3 of the petition are misleading. Petitioners have avoided pictorialization of the commercially used cans; instead, they have illustrated exhibits which were never commercially used but were specially prepared by petitioners for use in *ex parte* "surveys". Neither petitioner actually uses

(nor does respondent use) naked red-and-white banding as is suggested by the pictures in the petition *(II, 1179a; III, 54)*. We here insert pictures of a Campbell can (Armour Ex. 97, physical, offered II, 772a) and a Carnation can (Arm. Ex. 74, physical, offered II, 770a) as they are sold to the public.

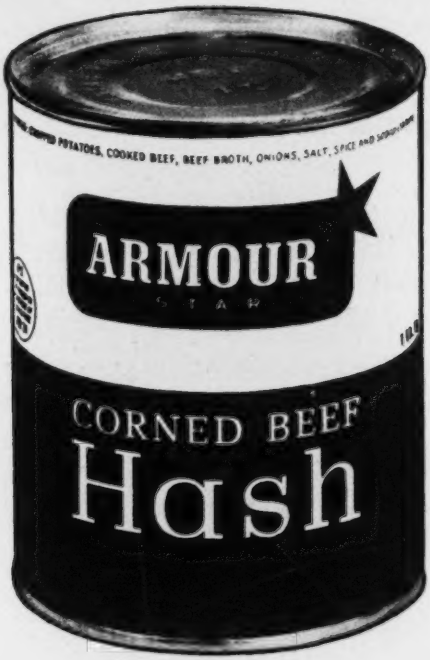




As these pictures show, the products of the two petitioners are differentiated one from the other and identified by the purchasing public by reason of the presence on the cans of integers other than the common banding, notably the name "CAMPBELL'S" on petitioner Campbell's labels and the name "CARNATION" on petitioner Carnation's labels (I, 272-3a; *II, 1179a; III, 54)*. These differ-

entiating integers are vital as badges of exclusive origin, because the goods of *each* petitioner are sold at retail in virtually every food store in the United States *(II, 1172a, 1180a)*.

We here insert a picture of one of respondent's cans alleged by petitioners to infringe (Ptf's. Ex. 15, physical, offered I, 100a).



A comparison of the foregoing pictures with one another, and with the pictures in the petition (pp. 2-3), emphasizes the unreality of the petition and its avoidance of the facts upon which the courts below found that petitioners had no just cause for complaint against respondent's labels.

(6) There is no justification whatever for the suggestion (Petition, p. 3, p. 5) that red-and-white banding constitutes respondent's "mark". The accused labels are but one group of many related labels comprising a label "family" having different color combinations *(II, 1175-6a)*. The allocation of color to different products is generally on divisional lines. Red was allocated to respondent's Canned Foods Division because most of the commodities in that division are meats *(II, 1176a)*. Red is the natural and logical color to use in connection with the advertising and exploitation of meat and is the one generally used in the meat packing industry (II, 967a, 1022a).

Respondent's labels with their varied colors are illustrated in Exhibit 3 of the Answer to the Complaint (I, 73a), which for convenience is partially reproduced as Appendix C of this brief (*infra*, facing p. 50).

The dominant feature of all of respondent's labels is its "Armour Star" trade-mark which identifies the product to the purchasing public as respondent's *(II, 1176a)*. "Armour Star" has been respondent's trade-mark for more than eighty years *(II, 1175a)*.

The accused labels are distinctive at all distances at least up to thirty feet and are readily distinguished from the labels of either petitioner *(II, 1176a)*.

In petitioner Campbell's labels the red band has always been uppermost. In petitioner Carnation's labels it has always been uppermost, except for a trivial use in two southwestern cities where it was used lowermost *(II, 1172a)*. Respondent never places the red band uppermost. Respondent uses a different shade of red from that employed by either petitioner *(II, 1175a)*.

For convenient side-by-side comparison of the accused labels with petitioners' labels, we reproduce as Appendix D of this brief (*infra*, facing p. 52) a photograph showing a display made by respondent at the trial (Arm. Ex. 600, physical, offered II, 989a). Ordinarily the products of the several parties are separately displayed in retail stores, but even if they are intermingled, and whether rightside up or upside down, respondent's labels are readily distinguished from the labels of either petitioner *(II, 1176a)*.

(7) Respondent's labels were designed, adopted and used in good faith with the intent of building respondent's own good will and without any intent to trade upon or profit by the good will enjoyed by either petitioner *(II, 1176a)*.

(8) Petitioners did not even attempt to show passing off or actual confusion in trade; there has been none *(III, 54; II, 1176a)*.

(9) The petition ignores the limitations of petitioners' registrations and their various disclaimers.

In petitioners' foreign trade-mark registrations each of them disclaimed any exclusive right to a half-red and half-white label *per se (II, 1173a)*.

Petitioner Carnation, in the year 1900, filed a sworn declaration in the United States Patent Office saying that the "essential feature" of its trade-mark was the word "Carnation" and disclaiming red-and-white (III, 1a); it was not until twenty-seven years later that Carnation asserted that the red-and-white background of the label constituted a "trade-mark" *(II, 1173a)*.

Petitioner Campbell, in its applications for United States trade-mark registrations filed more than forty years ago, originally asserted a trade-mark right inclusive of white-over-red as well as red-over-white, but before the registrations were granted Campbell voluntarily limited itself to red-over-white *(II, 1170-1a)*, which respondent never uses.

Moreover, while petitioners' United States registrations show rectangular designs (I, 23-31a; I, 39-41a) petitioners, as the Court of Appeals noted, actually use endless bands of color rather than the rectangles shown in their registrations *(III, 51)*.

(10) In their petition and brief, petitioners repeatedly assert that the public relies upon red-and-white as denoting origin with them (see e.g., pp. 6, 14, 17, 19, 20, 22). Those assertions are unfounded in fact.

Both the District Court and the Court of Appeals held that the goods of each petitioner are identified by other words and devices *(II, 1179a; III, 54)*.

Petitioners inaccurately assert (Petition, p. 19) that the record is "replete" with evidence supporting their contention; they ignore the overwhelming evidence to the contrary (I, 207a, 270-3a, 316a, 375-6a, 380-1a, 411a, 418a, 420a, 529a; II, 999-1000a, 1004-5a, 1034-6a, 1093-4a, 1118a, 1121-2a).

Petitioners also ignore the fact that there has been widespread use of red-and-white banding on food products by third parties. Literally hundreds of millions of food packages with red-and-white banded labels have been sold in this country by third parties (II, 778a, 808a, 813a, 817a, 819a, 820a, 825a, 827a, 835a, 838a, 846a, 851a,

854a, 859a, 865a, 866a, 869a, 870a, 872a, 876a, 882-6a, 892-3a, 897a, 899a, 901a, 907a, 911a, 913a, 915a, 919a, 924a, 932a, 935a, 1048a, 1051a, 1052a, 1054a, 1056a, 1074a, 1088a, 1091-2a).

The third-party labels have been used for various periods of time up to forty years *(II, 1174a)*. Specimens of a few of them appear in Volume III of the Record. Those of at least 18 concerns, although "deemed to be infringing" by petitioners, were never protested by either petitioner *(II, 1174a)*. Others were the subject of some protests but upon refusal of the proprietor to change the labels, petitioners acquiesced in their continued use *(II, 1174a)*.

Petitioners also ignore the adverse use of red-and-white as between themselves. For thirty-five years there was naked acquiescence by each petitioner in the concurrent use of red-and-white banding by the other *(II, 1172a)*. After that length of time, petitioners undertook by agreements to divide the "rights" in red-and-white banding between themselves on a world-wide basis for a period of one hundred years *(II, 1173a)*. The "right" to use it on different foodstuffs was allocated to one petitioner or the other by a process of bargaining between them *(II, 1173a)*.

It was on these facts that the District Court held that red-and-white had not been used by either petitioner as a badge of exclusive origin, had not in fact functioned as a badge of exclusive origin, but was mere tasty dress, and that petitioners' several trade-mark registrations, insofar as they are addressed to the use of red-and-white bands or panels *per se*, are invalid *(II, 1176-7a)*.

(11) There was a full trial in the District Court. The District Judge heard the testimony of officers of each of the parties, advertising men, label designers, survey witnesses, psychologists, retail merchants, housewives and others. He had before him the depositions of a large number of third-party users of red-and-white labels. More than eight hundred exhibits, including a large number of labels and physical specimens of foodstuffs as actually marketed, were introduced. The District Court made detailed findings of fact and vindicated respondent in every particular *(II, 1169-82a)*.

Petitioners appealed. The Court of Appeals left the findings of fact undisturbed and unanimously affirmed with an opinion *(III, 48)* wherein it considered whether Federal or State law should apply, found that it made no difference in view of the facts at bar, and then reviewed and confirmed the applicability of certain of the legal principles relied upon by the District Court, observing that no more extended discussion was necessary in order "to show that the decision below was correct" *(III, 54)*.

IV.

ARGUMENT.

(1) The petition controverts and ignores controlling facts found by the District Court and accepted by the Court of Appeals: Both the District Court and the Court of Appeals held on the authority of the apposite cases, including *Leschen Rope Co. v. Broderick,* 201 U.S. 166, that mere *bands* of color, such as petitioners use, cannot be monopolized *(II, 1177-9a; III, 51-3).* Petitioners do not challenge the soundness of those authorities. In following them, the courts below merely applied settled law to the particular facts of this controversy. The Court of Appeals considered and distinguished, *on their facts,* the decisions in other circuits which petitioners say are in conflict with the decision below (see *infra,* p. 19).

Four of the matters decided by the District Court should be recapitulated here, viz.: (a) that the red-and-white banding *per se* has not been used by either petitioner as a badge of exclusive origin and has not functioned in fact as a badge of exclusive origin; (b) that each petitioner uses other integers on its labels, notably the name "CAMPBELL'S" by one petitioner and the name "CARNATION" by the other, upon which the purchasing public relies to identify the petitioners' respective goods and differentiate the goods of one petitioner from those of the other; (c) that respondent's labels all have the "ARMOUR STAR" trade-mark as their dominant feature, are distinctive at all distances at least up to thirty feet and are readily distinguished from the labels of either petitioner; and (d) that there

has been no passing off or actual confusion in trade (*supra*, pp. 8-9, 4-5, 6, 7).

The Court of Appeals dealt approvingly with these elements of the case and left the findings of fact undisturbed. Petitioners did not deny in the Court of Appeals, nor do they deny here, that there is ample support for the findings in the evidence.

Nevertheless, in disregard of the facts as found, petitioners assert that the red-and-white banding is in fact a "trade-mark" (Petition, p. 2); that the purchasing public "relies" on it to denote origin (p. 6); that it is "the means by which the public identifies petitioners' products" (p. 19) and, by necessary implication, that it is the dominant badge of origin for each petitioner (pp. 22-3).

(2) Petitioners' "Questions Presented" do not merit consideration by this Court: Petitioners pose three questions which they seek to have this Court decide (Petition, p. 5).

Under Question 1, petitioners would have this Court declare that a mere band of red printed on a white paper label is susceptible of monopolization. The authorities relied on below hold that it may not. Petitioners cite no conflicting decision; they merely assert that the disposition of this case on its facts conflicts with "results arrived at" in other cases (Petition, p. 4). The controlling point here, however, is the fact that the red-and-white banding has never functioned as a badge of exclusive origin *(II, 1176-7a)*, i.e., it has never had trademark significance on the goods of either petitioner. In these circumstances, Question 1 is academic.

Question 2 asks this Court to review the facts distilled by the courts below out of a thousand pages of evidence and eight hundred exhibits and arrive at a conclusion contrary to that arrived at by all of the judges below.

Question 3 is moot because it does not state the *ratio decidendi* of the courts below. It will be borne in mind that the charge of unfair competition is based solely on the normal commercial use of the accused labels. There has been no confusion of the several labels in commerce (*supra*, p. 7) and there is no likelihood of any. The District Court said *(II, 1181a)*:

> "Taking into consideration the series of surveys which were conducted, the opinion of numerous advertising authorities, eminent psychologists, and the actual viewing of mass displays, I cannot say that there is *any* likelihood of confusion between Armour's goods and the goods of either plaintiff." (Emphasis supplied).

The District Court then noted, and rejected, a suggestion in the evidence that a purchaser seeing the colors red and white in mass display would be attracted to that part of the store under the impression that she was approaching one of petitioner's products, and concluded its opinion by saying *(II, 1182a)*:

> "At any event, the realities of the situation must be taken into consideration, and as has been stated on numerous occasions, purchasers do not buy in a vacuum and I am convinced that the difference in position of white over red, the difference in the shading in the Armour's red over that of either Campbell or Carnation, the presence of the Armour

> Star on the label, plus the fact that the word ARMOUR is spelled out in blocked lettering as differentiated from the Campbell and Carnation lettering, which is almost alike and in script, present sufficient differences *to the buyer of ordinary intelligence* as not to confuse him and hence the defendant is not palming off his goods as those of another." (Emphasis supplied).

In these holdings the District Court followed the rule of the apposite decisions of this Court (cases *infra*, p. 22) and was affirmed by the Court of Appeals.

The quoted language in petitioners' Question 3 has been lifted out of context and, as employed in Question 3, gives a wholly erroneous impression of the *ratio decidendi* of the courts below. The quoted language was taken by the Court of Appeals from a fact finding of the District Court *(II, 1176a, Finding 36)* and merely states that no intelligent purchaser using reasonable care would confuse petitioner *Campbell's* label with petitioner *Carnation's* label. That finding was appropriate to the case, because petitioners' witnesses, in an unsuccessful attempt to persuade the Trial Judge that the red-and-white banding is the dominant identifying feature of petitioners' several labels, had perforce asserted that the Campbell and Carnation labels were alike, even to the extent of being confusingly similar (see e.g., I, 205a, 134a, 375a). Both the District Court and the Court of Appeals rejected the contention, pointed out the material differences between the Campbell and Carnation labels and in effect characterized petitioners' argument as specious by saying that no "intelligent purchaser using reasonable care" would confuse them.

Not only have petitioners placed an erroneous construction on the language quoted in their Question 3, but they have also implied that the finding of fact from which it was drawn was the sole basis for the conclusion that respondent has not been guilty of unfair competition (Petition, pp. 20-1). A reading of the quoted language in its contexts below suffices to show that petitioners' suggestion is unwarranted.

ISSUES IGNORED BY THE "QUESTIONS PRESENTED": We have specifically discussed the three questions stated in the petition. It is important to note, however, that even if all three of petitioners' "Questions Presented" were answered in the way that petitioners urge, they would not be dispositive of the controversy. Consonant with the requirements of *Furness, Withy & Company, Limited, v. Yang-Tsze Insurance Association, Limited, et al.*, 242 U. S. 430, 433-4, we here outline other points in the case which, independently of those posed by the "Questions Presented," bar petitioners' claims:*

(a) There was acquiescence by each petitioner in the use of substantially identical red-and-white banding by the other petitioner for some fifty years, thirty-five years at arm's length and fifteen years by formal agreement *(II, 1172-3a)*.

(b) There was acquiescence by both petitioners in the widespread competitive use, by a large number of third parties, of labels having red-and-white banding "deemed to be infringing by the

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* The District Court found for respondent on the points now to be discussed; the Court of Appeals said, "We do not deem it necessary to go into them and our failure to do so is not an indication that we disagree with the District Court upon them" *(III, 54)*.

plaintiffs" for periods up to forty years *(II, 1174a)*. Hundreds of the third-party labels are physically in evidence; representative ones reproduced in the record are now before this Court (III, 5a, 9-43a).

(c) There was acquiescence by petitioner Carnation in an adverse adjudication of the identical charge of unfair competition here advanced (Appendix B, *infra*, p. 39) until the filing of this action thirty-two years later, even to the extent of putting up evaporated milk for a competitor—the "Co-Op" chain store group—under a red-and-white banded label *(II, 1178a, 1174a)*. A copy of that label appears at III, 9a. Like respondent's accused labels, it is white-over-red.

It has long been settled by decisions of this Court that widespread non-exclusive use, even of a mark originally valid, with the acquiescence of the trade-mark owner is fatal to any claim of exclusive right in it; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19; *Saxlehner v. Nielsen*, 179 U. S. 43; *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427. The affirmative action of each petitioner in encouraging the use of red-and-white banding by the other and the action of petitioner Carnation in supplying red-and-white banded labels to the Co-Op chain are also destructive of any alleged exclusive right in the premises; *R. L. Bennett & Sons v. Farmers' Seed & Gin Co.*, C.A. 5, 288 Fed. 365; *William H. Keller, Inc. v. Chicago Pneumatic Tool Co.*, C.A. 7, 298 Fed. 52; *Everett O. Fisk & Co., Inc. v. Fisk Teachers' Agency, Inc., et al.*, C.A. 8, 3 F. 2d 7. As the District Court below said, "the plaintiffs have obtained no exclusive right of user to the red and white band for the reason that each one themselves have used it and diluted it of what-

ever of value there was in it by reason of the registration to both of them" *(II, 1180a);* and "'A trade-mark cannot serve two masters; it cannot identify two sources at the same time and remain a trade-mark'" *(II, 1180a).** The Trade-Mark Act of 1946, which petitioners here invoke, specifically provides that a registered mark shall be deemed to be abandoned under such circumstances; 15 U.S.C. 1127.

(d) Each petitioner disclaimed any exclusive right to red-and-white banding in order to obtain British trade-mark registrations *(II, 1173a).* Petitioner Carnation disclaimed red-and-white banding and characterized it as a mere "field or background" in procuring a registration of its real trade-mark, the word "CARNATION" forty-nine years ago *(II, 1171a).* Petitioner Campbell disclaimed white-over-red in obtaining its United States trade-mark registrations *(II, 1171a).*

These disclaimers bar petitioners in their present contentions; *Holzapfel's Co. v. Rahtjen's Co.,* 183 U. S. 1.

(e) There were agreements between the petitioners in contravention of public policy to divide the use of red-and-white banded labels over the entire world and one effect of the agreement was to preclude each petitioner from any right to oppose the other's applications for trade-mark registrations *(II, 1173a).*

Petitioner Campbell's registrations (I, 23-31a) and petitioner Carnation's registrations (I, 39-41a) upon which

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* The District Judge here quoted from Nims, *Unfair Competition and Trade-Marks.* It was *admitted* during the trial that the alleged trade-mark "is serving two masters" (I, 206a).

this action is predicated are all in the same statutory class. Consonant with their private agreement, petitioners have obtained and maintained these conflicting registrations in contravention of the statute; 15 U.S.C. 85. This agreement bars petitioners from the aid of a court of equity; *California Fruit Growers Exchange v. Sunkist Baking Company*, C.A. 7, 166 F. 2d 971.

(3) Petitioners' "Reasons for the Allowance of the Writ" are utterly without merit: This case is essentially factual in nature; its outcome did not turn upon any novel, disputed, or uncertain question of law. The action represents a bald attempt on the part of two unrelated companies to exclude all others from using red-and-white banding on foodstuffs and to share it between themselves, allocating its use on one commodity or another in accordance with past bargaining between them or by future bargaining as other commodities are brought on the market (I, 192-3a; *supra*, p. 3). The courts below, in denying petitioners the exclusive use of red-and-white banding, made it clear that they were not denying either of them protection in the marks which actually give distinctiveness to their several labels *(II, 1179a; III, 54)*.

Petitioners assert that the decision below "increases the doubts and uncertainties" in respect of color-design in trade-marks (Petition, p. 6). But the court below enounced no new law on this subject; it simply applied the principle of earlier decisions exhibiting parallel facts. Petitioners' real complaint is not that the rule of law is doubtful or controversial, but that they do not like its application to the facts of this controversy. Petitioners' assertion that the decision below has created

doubts and uncertainties in business and legal circles (e.g., Petition, pp. 4, 14, 20) is a mere figment of the imagination.

The decision of the court below is not in conflict with the decisions of other Courts of Appeals on "color devices" (*cf.* Petition, pp. 4, 6-11, 18-19). It is significant that petitioners do not quote from any of the alleged conflicting decisions or suggest that they enounce any principle of trade-mark law conflicting with that applied herein by the courts below. Petitioners merely assert that the conflict is in the "results arrived at" and ignore the controlling factual differences.*

The several allegedly conflicting decisions now relied upon by petitioners were specifically considered below and the opinion of the Court of Appeals said of them *(III, 53)*:

> "Each illustrates on its facts the importance of a distinct and arbitrary design which includes color in its total effect. Color is only one element in the similarity of the marks held to have infringed."
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> * * * * * * *
>
> "The mere division of a label into two background colors, as in this case, is not, however, distinct or arbitrary, and the District Court so found."

Mishawaka Rubber and Woolen Manufacturing Co. v. S. S. Kresge Co., C.A. 6, 119 F. 2d 316, modified 316 U. S. 203, (Petition, p. 7) was before this Court only on a rule of accounting. The mark was here assumed to

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* "* * * in trade-mark cases, even more than in other litigation, precedent must be studied in the light of the facts of the particular case"; *Colburn v. Puritan Mills, Inc.*, C.A. 7, 108 F. 2d 377, 378.

be valid, so there is no question of conflict as between this Court and the courts below.

The red ball trade-mark in the *Mishawaka* case had been held valid in the lower courts only because the proofs had established a *secondary meaning;* 119 F. 2d, p. 325; there is no corresponding finding in this case (one was requested by petitioners but was refused; III, 45a). The over-all appearance of the infringing heels appears to have been so close to that of the plaintiff's heels that it was difficult to distinguish the one from the other; in the case at bar the several labels of the parties contain such strikingly dissimilar integers that respondent's labels are distinctive at all distances up to thirty feet. Consequently there is no conflict in the "results arrived at" in the two cases. Neither is there any conflict as to the principles governing validity and infringement of trade-marks.

G. H. Mumm Champagne v. Eastern Wine Corp., C.A. 2, 142 F. 2d 499, (Petition, pp. 8-9) involved champagne labels whose use was under such circumstances that unscrupulous substitution would be easy.* Infringement was found, not because of the mere identity of diagonal red bands but because of the use with the red band of other integers so that the over-all appearance of the labels was too much alike. It is significant, however, that an earlier label of Eastern Wine Corporation—a white label with a red stripe on the other diagonal† and carrying no legend—was not deemed by

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* No such circumstances of use are present here (see, e.g., I, 418-9a, II, 999-1000a, 1034-5a, 1117-8a).

† Cf. petitioners' use of red-over-white and respondent's use of white-over-red.

the court to be infringing. The change from that label to the infringing one "was a deliberate imitation".

Ohio Baking Co. v. National Biscuit Co., C.A. 6, 127 Fed. 116, (Petition, pp. 9-10) did not involve mere banding but a unique geometrical figure, namely a square with clipped corners and having a superimposed white geometrical design. It was because of deceptive similarity in respect of these combined integers that the court found infringement. The injunction made it clear that labels sufficiently different in their over-all and general appearance as not to be calculated to deceive the ultimate ordinary purchaser were not enjoined. The right to monopolize color was limited, as in the present case, to its use "in combination with other things." The defendant was left free to use the same colors so long as it did not use them in such a way as "to mislead the public, and market [its] goods as those of another."

Bass, Ratcliff & Gretton, Limited v. Christian Feigenspan, 96 Fed. 206 (Petition, pp. 10-11) is not a Court of Appeals decision at all; it is the decision of a trial court in the Third Circuit.

Finally, petitioners are wrong in asserting that the decision below is in conflict with the unfair competition decisions in other circuits and with the Federal Trade Commission cases in this and other courts (*cf.* Petition, pp. 11-13, 20-23). In the last analysis this is simply a label case wherein the distinctiveness of the accused labels led inevitably to the dismissal of the charge of unfair competition. In their attempt to get away from the facts, petitioners have erroneously stated the basis for the dismissal of the unfair competition charge and have spelled out a conflict from their own misstatement

(*supra*, pp. 13-15). Whether petitioners' complaint as to the accused labels be styled "trade-mark infringement" or "unfair competition" they comply with the standards of fair competition laid down by this Court; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 572-3; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 467; *Canal Co. v. Clark*, 13 Wall. 311, 322; *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 412; *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 120-1; or as laid down by the Supreme Court of Pennsylvania; *Stroehmann Bros. Co. v. Manbeck Baking Co.*, 331 Pa. 96, 200 Atl. 97.

(4) Consonant with the apposite decisions of this Court, the petition should be denied: There is nothing extraordinary about this case except the brazenness of petitioners' monopolistic claim. There is no conflict of circuits and no question of general public import requiring the intervention of this Court; *cf. Magnum Import Co. v. Coty*, 262 U. S. 159, 163; *Layne & Bowler Co. v. Western Well Works*, 261 U. S. 387, 392-3; *Forsyth v. Hammond*, 166 U. S. 506, 513-4.

The issues are essentially factual. The real purpose of the petition, particularly in respect of petitioners' Questions 1 and 2, is, we submit, to obtain still another review of those facts; *cf. Graver Tank Mfg. Co. v. Linde Co.*, 336 U. S. 271, 275; *Crowell v. Benson*, 285 U. S. 22, 65; *United States v. Johnston*, 268 U. S. 220, 227; *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 441. The only purported law question posed is Question 3 which, however, does not arise in this case; *cf. Keller v. Adams-Campbell Co.*, 264 U. S. 314, 319-20; *Tyrrell v. District of Columbia*, 243 U. S. 1, 6; *Furness, Withy & Co. v. Yang-Tsze Insurance Association*, 242 U. S. 430, 433-4; *United States v. Rimer*, 220 U. S. 547, 548. Moreover,

even if all three of petitioners' questions were answered in the way petitioners urge they would not be dispositive of the controversy; *cf. Triplett v. Lowell,* 297 U. S. 638, 648-9; *Crowell v. Benson, supra; Southern Power Co. v. Public Service Co.,* 263 U. S. 508, 509; *United States v. Rimer, supra.*

The petition should be denied.

Respectfully submitted,

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September, 1949.

APPENDIX A.

1169a*

Opinion of the District Court.

GANEY, *J.*:

This is a suit by Campbell Soup Company and Carnation Company, complainants, to restrain the defendant, Armour and Company, from using a red and white device in any form approximating that of the present red and white banded label used on their products.

The complaint alleges that the plaintiff companies, Campbell and Carnation, have adopted identical trademarks for their food and ingredients of food products; that each have done a large amount of business under the identical trade-mark in using the slogan, "Look for the red and white label", since the products of the plaintiffs bear red and white labels on their cans; that the red and white labels constitute a trade-mark which symbolizes the good will of each plaintiff and that their concurrent use of it in the United States and in foreign countries is the subject of an agreement between them; that the defendant, Armour and Company, has adopted a label for its products using white over red, and that the use of the same by the defendant is imitative of the trademark of the plaintiffs; that there is likelihood of confusion as to the source of origin of the defendant's products with the products marketed under the plaintiffs' alleged trademark; that the defendant by using the label white over red has competed unfairly with the plaintiffs, and has been guilty of unfair trade practice. Accordingly, an injunction is asked by the plaintiffs to restrain the defendant from using the band white over red on its products, or in any form approximating that of its present label, as well as for an accounting of all profits derived by the defendant for the sale of merchandise under the present label complained of.

With respect thereto the Court makes the following

FINDINGS OF FACT:

1. The plaintiff, Campbell Soup Company, hereinafter called "Campbell", is a New Jersey corporation, with its

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* Record paging; see footnote *supra*, p. 2.

principal place of business at Camden, New Jersey, and is a citizen, resident and inhabitant of the State of New Jersey.

2. The plaintiff, Carnation Company, hereinafter called "Carnation", is a Delaware corporation, with its principal place of business at Milwaukee, Wisconsin, and is a citizen, resident and inhabitant of the State of Delaware. The predecessor of Carnation was originally known as Pacific Coast Condensed Milk Company.

3. The defendant, Armour and Company, hereinafter called "Armour", is an Illinois corporation, with its principal office or place of business at Chicago, Illinois, and is a citizen, resident and inhabitant of the State of Illinois, and authorized to do business in the State of Pennsylvania and maintains a place for the transaction of business in the Eastern District of Pennsylvania.

4. On October 31, 1905, a trade-mark registration was awarded to Campbell for a period of twenty years, the description thereof in part being as follows: "The trade-mark of said corporation consists of a rectangular panel having an upper half of red and a lower half of white". The asserted mark was limited to soups and known as No. 47,153 and was renewed in 1925 and again in 1945, with no change either in the description or the goods. In the original application for the trade-mark, the description merely referred to "• • • two bands, approximately centrally divided, one being white and the other red".

5. Trade-mark No. 47,154 was registered to Campbell in 1905 for baked beans with, in part, the following description: "The trade-mark of said corporation consists of a rectangular panel, the upper half of which is red and the lower half white, with the word 'CAMPBELL'S' appearing upon the upper half". This was likewise renewed in 1925 and again in 1945 with no change either in the description or the goods. In the original application the description did not specify whether the red or white was to be uppermost, and was later limited to the description above.

6. Trade-mark No. 48,664 was awarded to Campbell in 1906 for condensed soups and the description for it, in part, was as follows: "• • • a band, the upper half of which is red and the lower half white, with the word 'CAMPBELL'S' appearing in the upper half". In the original application there was no restriction as to which band was to be uppermost, but it was later limited by the description hereinabove.

7. Trade-mark No. 166,870 was registered in 1922 to Campbell for foods and ingredients of food, spaghetti being largely marketed thereunder. The description here provided for rectangular panels, the upper one red and the lower one white. Spaghetti has not been sold under this label since previous to 1939 although the registration was renewed without change in 1943.

8. Trade-mark No. 181,610 was registered in 1922 for certain canned goods, including tomatoes, corn, peas and beans, and while detailed the description provided for an upper panel of red and a lower one of white, specifies fleur-de-lis in gold, an upper border stripe of white and a lower border stripe of red.

9. All of the trade-mark registrations awarded to Campbell were under the Act of February 20, 1905, 15 U. S. C. 81, and were limited to panels of red over white after the original descriptions, sufficiently broad to admit of white over red, were amended.

10. The Carnation registration of September 18, 1900, No. 35,072, had an upper band of red with the word "Carnation" in script letters thereon, and a lower band of white, and three carnations centered on the label below the word "Carnation". The description, in part, provided: "Different styles of lettering may be used, and the field or background may be varied, without altering the character of the trade-mark, the essential feature being the word 'CARNATION' ".

11. The Carnation registration trade-marks here asserted are Nos. 239,791 and 282,053 for evaporated milk and con-

densed milk products and describe the panel as red over white, the uppermost being red and the lowermost being white. Application was made for the former on October 12, 1927 and for the latter on May 8, 1929.

12. The trade-mark registrations of Carnation were registered under the Act of February 20, 1905.

13. On the Campbell label the red panel has always been at the top while on the Carnation label it has likewise always been at the top except for a small number of labels used by it in two states in the southwest where it has been at the bottom. Campbell and Carnation both use a dark red; the Carnation red being slightly darker than the Campbell red. Campbell's principal product under its red and while label is condensed soups although it has been used for spaghetti, however, spaghetti as has been indicated, has not been marketed by Campbell since prior to 1939, since which time it has been sold under the label of "Franco American". Campbell's red and white labels carry the name "CAMPBELL'S" in white script on the red band.

14. Carnation's principal product under its red and white labels is evaporated milk, but it has been used on ice-cream and breakfast cereals also. Carnation milk labels carry the name "CARNATION" on the red band in a position corresponding to the name "CAMPBELL'S" on the Campbell Soup can and in white script of a style similar to that used on the Campbell cans.

15. Campbell's business began on the Eastern seaboard and Carnation's business began on the Western seaboard, and both had achieved national distribution as early as 1911. Each of the plaintiffs distribute their products through 95% of the retail stores in the United States.

16. For a period of 35 years, Campbell and Carnation concurrently used virtually identical red and white banding on their products, during a large period, of which time the products were in national distribution and sold in the same stores.

17. After 35 years of such concurrent use, in January, 1934, Campbell and Carnation entered into an agreement, in writing, regarding their respective rights in the use of red and white banded labels, a similar agreement with respect to the foreign business of the two companies was made a year or two earlier. In general the agreement provided that Carnation should use the red and white labels on dairy and cereal products and Campbell was to use the labels on soups and all other food products. The division of the field between the two was made as a result of bargaining between the plaintiffs. The foreign agreement insofar as it operated in Germany was to be perpetual and for 100 years insofar as it operated over the rest of the world.

18. One of the effects of the agreement was that the plaintiffs agreed not to dispute the rights of the other whereas previous to the agreement they were entitled to oppose one another's applications for trade-mark registration.

19. Both plaintiffs for many years in magazines, newspapers and radio advertisements have been using the slogan, "Look for the red and white label" or its equivalent without protest from the other.

20. Although it has been using the red and white label since 1900 when the registration was obtained under the name of the Pacific Coast Condensed Milk Company, Carnation did not assert until 27 years later that the red and white background of the label constituted a trade-mark.

21. In trade-marks registered in Great Britain both plaintiffs disclaimed any right to monopolize a half red and half white label *per se*.

22. From 1929 to 1946, over a 17-year period, a concern in Spokane, Washington, called Broadview Dairy Company, used red and white labels, and sold its product in the same stores with Carnation and although Carnation in fact owned Broadview Dairy Company, there was nothing on the label to inform the purchaser that such was the fact, thus making it appear that the product came from a different maker.

A like situation obtained for a period of three years and still continues in Portland, Oregon, with respect to Damascus labels. Although in fact owned by Carnation there is nothing on the container to show that Damascus is a Carnation product.

23. In 1942 and 1943 Carnation packed for and sold to National Co-Operatives, Inc. more, than a quarter of a million cans of evaporated or condensed milk under "Co-op" labels, which had the upper half white and the lower half red.

24. Red and white banded labels have been used in the food industry by concerns other than those involved in this litigation for various periods of time up to 40 years. On some of these labels of third party users, the red band is uppermost and in some it has been lowermost. The plaintiffs have at various times protested the use of some labels although 18 third party labels were deemed to be infringing by the plaintiffs, but they did not protest them, among which are "Ann Page" baking powder sold by the A. & P. Stores, a white over red label on the market for seven years, and VanCamp Sardines, sold by VanCamp Seafood Company, Inc., a white over red label, which has been on the market for 30 years. With respect to certain other third party labels one or both of the plaintiffs have made some protests but upon refusal to change it, has acquiesced in the continued use of the label, among which are "Manchester" labels of Manchester Packing Company, and "Valamont" labels of National Fruit Canning Company. It is a fair inference to draw that companies as large as the plaintiffs' having representatives covering most of the retail stores at regular intervals for the purposes of sales promotion and to make advertisement layouts, acquire knowledge of the use of the third party labels in commerce.

25. The only foreign trade-mark registration that Campbell has shown to possess is British being in four colors, red, white, gold and black, and the registration is limited to the

use of the colors "exactly as shown in the representation on the Form of Application", wherein it is illustrated with the red uppermost and in the form of a rectangular panel, rather than an endless band.

26. The only foreign trade-mark shown to be possessed by Carnation is a British registration which provides that it gives "no right to the exclusive use of the device of a label with the upper part red and the lower part white".

27. Armour has been in business more than 80 years with more than 250 branches and conducts its business on a nation-wide scale, and has been using "Armour Star" or its equivalent as its trade-mark in its advertisements during this period of time.

28. Prior to the adoption of the labels herein complained of, the Armour labels were not well related one to another and were in part illegible. The accused labels were designed with a view to simplification and improvement, with particular reference to the need for legibility in self-service stores where the housewife selects her own purchases, and with a view to having one common badge which would identify all the Armour products so that the goodness and quality of one would help in selling the others.

29. The accused labels all have white and red as background colors, arranged in most instances as endless bands rather than in the form of a rectangular panel. In some cases the area of the red and the white is the same. In other cases the ratio of red to white differs materially from fifty-fifty. In some cases the red and white bands are vertical, rather than horizontal. The reds employed differ from the reds used on the Campbell and Carnation cans. The Campbell and Carnation reds are stock "out of the can" colors while the Armour red is specially blended.

30. The accused labels are members of a family of labels, some of which are white and red and others of which are white and green, white and blue, white and orange, white and yellow and red, white and green. Different Armour

products, displayed under this variety of colors, are sold in the same stores.

31. The allocation of color to different products is generally on divisional lines. Red was selected for Armour's Canned Foods Division because most of the commodities in that division are meats. Armour has used red and white labels, although in a different configuration, before it adopted the accused labels.

32. Although evaporated milk is marketed through Armour's Canned Foods Division, a pale blue label is used.

33. The Armour Star trade-mark is the dominant feature of all of the Armour labels. It is embodied in a distinctive badge consisting of a rectangular panel with rounded corners, maroon in color, with the name "Armour" appearing thereon in distinctive type and with a colored star superimposed on and projecting from the upper right-hand corner of the rectangle. The color of the star varies with the product. The Armour Star badge is the basic theme of Armour advertising and is used on trucks, signs, business cards, business forms, etc.

34. The accused labels were designed, adopted and used in good faith with the intent of building up Armour's own good will and without any intent to trade upon or profit by the good will enjoyed by either plaintiff.

35. The Armour labels are distinctive at all distances at least up to 30 feet and are readily distinguished from the labels of either plaintiff, either in mass displays or intermingled, and whether right side up or upside down.

36. The accused labels were put into use in 1945. There is no evidence of passing off or of actual confusion in trade. No intelligent purchaser, using reasonable care, would be confused as between the goods of either plaintiff.

CONCLUSIONS OF LAW:

1. The court has jurisdiction in the premises.

2. The red and white banding on the plaintiffs' labels has not been used by them as a badge of exclusive origin,

does not in fact function as a badge of exclusive origin, and gives no rise to any exclusive right.

3. Red and white banding is mere tasty dress which cannot be monopolized.

4. The agreement of January 6, 1934 between the plaintiffs is contrary to public policy and would be destructive of any trade-mark right in the premises if either of them had possessed such a right at the time the agreement was made.

5. The acts of Carnation in packaging Co-op milk in red and white labels as well as permitting in use the Broadview and Damascus labels without anything to indicate any proprietorship by Carnation in those labels, is inconsistent with plaintiffs' claim of right here, and is indicative of the fact that they have considered red and white banding mere tasty dress.

6. The defendant has not been guilty of unfair competition either in the United States or abroad.

7. Defendant has not been guilty of trade-mark infringement either in the United States or abroad.

8. Plaintiffs' trade-mark registrations, insofar as they are addressed to the use of red and white bands or panels *per se*, are invalid.

DISCUSSION:

The question posed here is whether the adoption by Armour of a white band over a specially blended red band, forming their label, makes for confusion as to the source of origin of its products and thereby constitutes a trade-mark infringement of the Campbell and Carnation labels, and additionally whether the use by the defendant of this label makes it guilty of unfair trade practice as regards Campbell and Carnation.

These questions as to trade-mark infringement and to unfair trade competition in turn evoke the question of whether or not the red and white banding on labels such as we have in the instant case can be lawfully monopolized by the plain-

tiffs. In Leschen & Sons Rope Company *v.* Broderick & Bascom Rope Company, 201 U. S. 166, the Supreme Court of the United States, while not in terms disposing of the question as to whether or not a color can constitute a valid trade-mark, says at page 171: "Whether mere color can constitute a valid trade-mark may admit of doubt. Doubtless it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this. In the case of Mandon's Trade-mark, 37 Chan. Div. 112, in which a trade-mark was claimed for a red, white and blue label, * * * The court remarked as follows: 'It is the plain intention of the act that, where the distinction of a mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like; but you cannot register a mark of which the only distinction is the use of a color, because practically under the terms of the act that would give you a monopoly of all the colors of the rainbow' ". However, in Pacific Coast Condensed Milk Company *v.* Frye & Co., 147 Pac. 865, 85 Wash. 133, the Court dismissed the complaint of the plaintiff's, now Carnation, wherein it sought to enjoin as unfair competition the use of labels having red and white banding with the white band uppermost, saying at page 868: "The primary colors are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monoply by foreclosing the use by others of any tasty dress". Again, in James Heddon's Sons *v.* Millsite Steel & Wire Works, Inc., 128 F. (2d) 6 the court says, page 9: "The boxes and packages used by appellant for its goods were in common use and the narrow red stripe applied to such boxes and containers is not a trade-mark and cannot be exclusively appropriated. It is true that the most universal element may be appropriated as the specific mark of a manufacturer's goods if it is used and claimed with a sufficiently complex combination of other things as to make the combination unique. * * * The alleged trade-mark here is a colored label which

gives a distinctive external appearance to the packages containing appellant's goods and one which indicates to some of the purchasing public that it contains appellant's goods, but does not point out distinctly the origin or ownership of the articles to which the label is affixed. Color, except in connection with some definite, arbitrary symbol or in association with some characteristics which serve to distinguish the article as made or sold by a particular person is not subject to trade-mark monopoly. Newcomer & Lewis *v.* Scriven Company, 6 Cir., 168 F. 621; Samson Cordage Works *v.* Puritan Cordage Mills, 6 Cir., 211 F. 603, L. R. A. 1915 F. 1107; Smith *v.* Walker, 57 Mich. 456, 22 N. W.. 267, 24 N. W. 830, 26 N. W. 783; Dayton *v.* Imperial Sales, etc., Co., 195 Mich. 397, 161 N. W. 958".

Accordingly, I am persuaded that mere color by the use of red and white banding cannot be appropriated as a valid trade-mark without at the same time identifying it with some symbol or integers, and here neither plaintiffs have used mere red and white bands without identifying integers, such as the name "CAMPBELL'S" or the name "CARNATION", upon which integers the purchasing public undoubtedly relies to identify the goods of the plaintiffs, one from the other. It would of necessity follow that two great companies marketing their products in almost all of the retail stores in the United States could not claim bands of red and white as distinctly original where they are referring to different characteristics and associations, such as are apparent when the two labels are compared, difference in names, in make-up, in other words, there being no definite association of color with the same design or characteristic. Further, if we make the assumption that the defendant's bands are imitative of the plaintiffs, the colors here are not referable to or associated with a design or characteristic peculiar to either of the plaintiffs, as the Armour's star is undoubtedly associated with the color red and white.

The essence of the trade-mark is that it shall be a true badge of origin indicating that the contents to which it is affixed is the product of the trade-mark proprietor and no

others, or as it is put by Nims, Unfair Competition and Trade-Marks, Fourth Edition, Vol. Two, p. 1289: "• • • it is vital to the existence of a trade-mark that it should be used by one and by only one concern. A trade-mark cannot serve two masters; it cannot identify two sources at the same time and remain a trade-mark".

It is difficult to see in view of this well established principle how the red and white banding can be claimed as a trade-mark by both Campbell and Carnation. This especially in view of the fact that for 35 years they existed side by side in nearly all the retail stores of the United States, and over that long period by extensive advertising the inference is strong that the consuming public looked to the name in combination with the color as its badge of origin to distinguish one from the other. To some degree corroborative of this is the fact that the agreement of 1934 entered into between the two plaintiffs does not base its adoption on confusion of origin of the products. This agreement while defining the rights between the contracting parties, it seems to me, could give no right as against third persons because the consuming public was no more aware of the agreement after its enactment than they were before, and confusion of origin, if any, as to the source of the goods, obtained as much before as after its adoption. California Fruit Growers Exchange *v.* Sunkist Baking Company, decided December 23, 1947, 166 Fed. 2d 971. In other words, the plaintiffs have obtained no exclusive right of user to the red and white band for the reason that each one themselves have used it and diluted of whatever of value there was in it by reason of the registration to both of them. The registration of a mark conveys no property right. Hanover Star Milling Company *v.* Allen & Wheeler Company, 208 Fed. 513. Ownership of the mark depends upon its adoption and use, not on its registration. Columbia Mill Co. *v.* Alcorn, 150 U. S. 460. It seems to me it is very dubious reasoning to say that as to the consuming public there is now confusion as to the source of origin of the defendant's goods even though its band is white over red and is a specially blended red, distinguishable

at 30 feet from either of the plaintiff's red, and yet there is no confusion as to source of origin on the part of the consuming public with respect to either Carnation or Campbell products even though the red in their bandings is more closely imitative one of the other than is the Armour red, merely because by agreement all has been taken care of. Accordingly, I hold there is no trade-mark infringement under the Act of February 20, 1905, nor of the Lanham Act of July 5, 1946, 15 U. S. C. A. Sec. 1051—1127, nor is there any contravention of the Pan-American Convention, nor is there any substance to the charge of trade-mark infringement abroad.

What has been said with respect to trade-mark infringement applies equally as well with respect to unfair competition. In Hanover Star Milling Company *v.* Metcalf, 240 U. S. 403, 412, the Court says: "This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition. Elgin Watch Co. *v.* Illinois Watch Co., 179 U. S. 665, 674; G. & C. Merriam Co. *v.* Saalfield, 198 Fed. Rep. 369, 372; Cohen *v.* Nagle, 190 Massachusetts, 4, 8, 15; 5 A. & E. Ann. Cas. 553, 555, 558". It would serve no useful purpose to review in detail the lengthy testimony covering the phase of unfair trade practices of the matter here at issue. Suffice it to say that a careful examination of the record very definitely persuades me that none here obtains. Taking into consideration the series of surveys which were conducted, the opinion of numerous advertising authorities, eminent psychologists, and the actual viewing of mass displays, I cannot say that there is any likelihood of confusion between Armour's goods and the goods of either plaintiff. The testimony shows almost without contradiction that within 30 feet a purchaser would not confuse the defendant's goods with that of either of the plaintiffs. Beyond 30 feet and what was designated as the primary area, there was some testimony that a purchaser seeing the colors red and white in mass display would go to that portion of the store under the impression that the product was either the product

of Campbell or Carnation. However, here again it seems to me that a purchaser would just as easily, if not more easily, at a distance of greater than 30 feet, be misled by a mass display of Carnation milk into thinking it was a Campbell product or vice versa, not knowing of the agreement of 1934, than he would be misled by a mass display of Armour products into thinking they were either Campbell or Carnation products by reason of the slight difference in color, as well as the change of their position. At any event, the realities of the situation must be taken into consideration, and as has been stated on numerous occasions, purchasers do not buy in a vacuum and I am convinced that the difference in position of white over red, the difference in the shading in the Armour's red over that of either Campbell or Carnation, the presence of the Armour Star on the label, plus the fact that the word ARMOUR is spelled out in blocked lettering as differentiated from the Campbell and Carnation lettering, which is almost alike and in script, present sufficient differences to the buyer of ordinary intelligence as not to confuse him and hence the defendant is not palming off his goods as those of another.

Motion for an injunction and accounting denied.

Final Judgment.

And now this 16th day of September, 1948, this case having been heard upon pleadings and proof, it is ordered that the plaintiffs' prayer for an injunction and accounting be, and the same is hereby denied and it is further ordered that the complaint be and the same is hereby dismissed.

By THE COURT

J. CULLEN GANEY, *J.*

APPENDIX B.

Opinion of the Supreme Court of Washington in Pacific Coast Condensed Milk Co. v. Frye & Co., 147 Pac. 865; 85 Wash. 133.

ELLIS, J. This is an action to enjoin, as unfair competition, the use of a label upon containers of condensed milk. The plaintiff and its predecessor have for about 15 years manufactured and marketed its "Carnation" brand of evaporated milk, using a label of sufficient length and width to practically cover the surface of the can, with equall horizontal bands of red and white, the red above and the white below. In the middle is a group of three carnation flowers, two red resting on the white background and one pink resting on the red background; with the word "Carnation" im prominent cursive script in white on the red background running in a straight line above the flowers and the word "'Brand" immediately under the word "Carnation" in small green letters. Immediately under the group of carnations in small red letters are the words "Sterilized Evaporated," and in large green letters the word "Milk," below which in small red letters are the words "An Unsweetened Condensed Milk." These as the major characteristics are placed in the middle of the label, and are flanked on either side by a torch, one half in red extending into the white band, and the other half in white extending into the red band. On either side outside of these torches are groups of printed matter containing a guaranty and directions. Across the top of the label in the red band is a row of white conventional fleurs-de-lis, and along the bottom in the white band a similar row in green. The defendant is a meat packer, and also operates a group of retail markets in the state of Washington where meats and other supplies are sold. For more than 18 years it has used the name "Wild Rose," together with a design of the rose in one form or another, on various articles as its brand. A few months before the commencement of this action it determined to enter the competitive field for the selling of evaporated milk, and adopted a label of the same size, shape, and color

as that of the plaintiff, with the red band below and the white above thus reversing the plaintiff's color scheme. The defendant's central figure is a cluster of three wild roses, the stems in white and green resting on the red background, the flowers pink resting upon the white background. Above the group of flowers are the words "Wild Rose" in prominent upright Roman letters, red in color, forming an arch. Immediately beneath it appears the word "Brand" in green letters. Immediately beneath the group of roses and in the red background appears the word "Sterilized" in small white letters, and immediately beneath that, the word "Milk" in prominent white letters. Flanking the entire figure on either side, instead of the plaintiff's torches, appear two upright scepters, one half in the white background and the other half in the red background. Outside of these on either side appears printed matter wholly different from that similarly placed on plaintiff's label. The defendant's label is not bordered with the fleurs-de-lis, but along the bottom of the red band it is bordered with alternating long dashes and round white dots, each edged with a crescent of green. The case was tried on affidavits and certain stipulated facts. The affidavits on behalf of the plaintiff were made by its president and secretary. The gist of that of the president is as follows:

"Condensed milk is, for the most part, sold through the channels of the grocery trade, wholesale and retail. Prior to engaging in the manufacture of condensed milk I was for many years engaged in the retail and wholesale grocery business, and am familiar with the habits of retail purchasers in the matter of selecting and indicating goods by reference to distinctive labels, and I know how readily confusion and deception in trade may arise from similarity of labels and trademarks. I have no hesitation in saying that the Wild Rose label as described in and shown by the exhibit annexed to the complaint herein might readily deceive the average purchaser at retail, and could easily be used by dealers in palming off goods so labeled upon incautious and illiterate buyers as for Carnation Milk. The injury to plaintiff's business is intensified by the reason that defendant's milk is much inferior in quality to plaintiff's product, which inferiority will, to those users not noticing that they are not getting plaintiff's product, result in leading them to think that plaintiff is not maintaining the standard of its product and will cease to buy it."

The affidavit of the secretary was to the effect that he believed the allegations of the complaint to be true. The affidavits on behalf of the defendant were those of its president, secretary and purchasing agent, to the effect that the name "Wild Rose," with the design of a rose or roses, had been used by the defendant and its predecessor for more than 18 years, especially on lard of the highest quality; that after careful consideration in seeking for a label which would be appropriate for condensed milk, they found the colors theretofore used by the defendant, red and black, were not suitable for a light product such as milk, that the color combinations most generally used on condensed milk or similar products are white and red or white and blue; that the probably attractive combinations are very few; that it is impossible to secure a trade-mark from either the state or the federal governments upon any design or combination of colors by reason of their common use; that any attractive design or combination of colors would be certain to present points of great similarity to some other label already in use; that affiants considered red and white more attractive than blue and white, and made their design therefore as distinctive and different from the plaintiff's and other manufacturer's using the same combination as ingenuity could accomplish, not with the view to any confusion, but to avoid such confusion, and to make defendant's milk under its well-known Wild Rose brand as distinctively different as possible. There were also affidavits of six managers of the defendant's retail markets in the state of Washington and of 54 retail grocers and general merchandise dealers throughout the state located in some 20 different towns and cities as follows:

"That each of them has been handling Wild Rose milk for periods averaging from one to six months; that they each for a long time past also handled Carnation milk; that not a single one of affiants has ever known of a single instance of a retail purchaser or any one else who was deceived by any similarity in the labels of Wild Rose and Carnation brands, or who mistook one for the other, or who was confused into buying or offering to buy one of the brands for the other; that the Wild Rose and Carnation labels are as different as many other styles of labels on independent brands of goods; that retail purchasers habitually distinguish between and call

for brands of canned goods they want by name; that in the judgment of affiants there is no likelihood of any retail purchaser's being deceived by the label into purchasing Wild Rose for Carnation."

There is also an affidavit of defendant's secretary that the affidavits above mentioned were those of all the dealers who have handled the Wild Rose brand, except six or eight, who were absent from their places of business when called upon, or were located at places so remote that they could not be reached at the time of hearing. The stipulated facts were to the effect that the defendant's Wild Rose label more nearly approached the plaintiff's Carnation label than any label of any other competitor save one, which had been abandoned at plaintiff's instance, that defendant's Wild Rose brand contained on the average about $5^{8}/_{10}$ per cent. of butter fat, while the plaintiff's Carnation brand contained not less than $7^{8}/_{10}$ per cent. of butter fat, and that the Wild Rose milk has usually been sold on the market at a lower price than the Carnation milk. The court entered a decree enjoining the defendant from using the Wild Rose label or any other label as closely resembling the Carnation label. The defendant appealed.

[1] Irrespective of technical trade-marks, courts have long recognized the right of the first user of a distinctive dress of goods to protection against use by another of a similar dress or name in unfair competition.

[2] The basic principle of the doctrine of unfair competition, though variously expressed, is exceedingly simple. It is just this—no dealer or manufacturer has the right, by any name, mark, sign, label, dress, or other artifice, to represent to the public that the goods sold by him are those manufactured or produced by another, thus passing off his goods for those of such other to the latter's injury. Rathbone, Sard & Co. v. Champion Steel Range Co., 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Sterling Remedy Co. v. Spermine Medical Co., 112 Fed. 1000, 50 C. C A. 657; Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790. Innumerable cases stating this principle in some form might

be cited. The whole doctrine rests on the prevention of fraud by the confusion of *things* through use of a label or dress which by another's use has come to connote a *particular thing*. Perlberg v. Smith, 70 N. J. Eq. 638, 62 Atl. 442. The difficulty in such cases lies, not in determining the governing principle, that is invariable and runs through all of the cases, but in applying that principle to the facts of a given case. For this purpose an examination of a multitude of decisions leads us to the conclusion that no rule, other than a very broad one, can be stated. A resemblance which would deceive an expert or very cautious purchaser may still give a right of action, but a resemblance which would deceive only an indifferent or careless purchaser gives no right of action. The true rule lies between these extremes, condemning what would be reasonably calculated to deceive the common or usual purchaser of the given article when exercising ordinary care. As said in Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 798, 59 C. C A. 54, 56:

"The line of demarcation between acts indicative of a lawful and of an unlawful intent here runs wide and clear between those which would not and those which would be likely to induce the common purchaser, when exercising ordinary care, to buy the article of the vendor as the product or property of his competitor. The duty is imposed upon every manufacturer or vendor to so distinguish the article he makes or the goods he sells from those of his rival that neither its name nor its dress will probably deceive the public or mislead the common buyer. He is not, however, required to insure to the negligent or the indifferent a knowledge of the manufacture or the ownership of the articles he presents. His competitor has no better right to a monopoly of the trade of the careless and indifferent than he has. Any rule of law which would insure it to either would foster a competition as unfair and unjust as that promoted by the sale of the goods of one manufacturer as those of another. One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition."

Even in trade-mark cases where the fact of infringement is in issue, the same broad rule applies. We find it nowhere

better stated than by Mr. Justice Clifford in McLean v. Fleming, 96 U. S. 245, 255 (24 L. Ed. 828):

"Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue; but a court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."

See, also, Coats v. Merrick Thread Co., supra; Bulte v. Igleheart Bros., 137 Fed. 492, 70 C. C. A. 76; Hubinger Bros. Co. v. Eddy (C. C.) 74 Fed. 551; American Tobacco Co. v. Globe Tobacco Co. (C. C.) 193 Fed. 1015.

[3] An examination of the complaint makes it plain that the gravamen of the charge in this case is an alleged imitative color scheme. It is the one specific feature emphasized throughout. It is averred, in substance, that the appellant, intending to imitate the respondent's label and to take unfair advantage of the wide reputation of respondent's label and product, has used a label of white and red parallel stripes, the red below and the white above, reversing the relative positions of the stripes as used by respondent. The specific points of resemblance are set out as follows:

"(1) In the two bands, one red and the other white, of uniform width, so placed upon containers that the upper half presents one color and the lower half the other color; (2) in the number, size, arrangement, and relative position of the several parts and words of the central figure, and in the colors in which the same are represented; (3) in the number of groups or paragraphs of printed matter outside of the central figure, and in their position with relation to each other and to the central figure; (4) in the use of green lettering upon the white band and white lettering upon the red band."

It is then averred that this resemblance, "and especially the substantial identity in color scheme and arrangement of major characters, causes such confusion as to mislead the ordinary intending purchaser." That the color scheme is the

chief offending element is further emphasized in the prayer for an injunction against the use by the appellant of "any label for milk of any kind which bears red and white bands such as shown on the foregoing label." An examination of the two labels makes it evident that if the claim of unfair imitation is sustained at all, it must be almost entirely upon appellant's use of the red and white colors. The names "Wild Rose" and "Carnation" neither sound alike nor look alike. In lettering, the two names are wholly dissimilar. Their only common point is that both are names of flowers. This can hardly constitute an actionable resemblance, especially since the appellant had adopted and given a vogue to the Wild Rose as a brand of its own for other goods long prior to the adoption of the name "Carnation" by the respondent's predecessor. The colors of the two groups of flowers are as dissimilar as possible, so long as both are meant to simulate the true colors of the respective flowers. While on each side of the central group on each label is a column of printed information, the wording and the substance of the one is entirely different from that of the other. The most prominent thing in this side matter of appellant's label is the name "Wild Rose Brand Sterilized Milk" and "Frye & Company." In that of respondent's it is respondent's name, "Pacific Coast Condensed Milk Co." The two really distinguishing features, the name of the brand and the name of the owner, neither of which bears the slightest resemblance to that of the respondent, are set out in appellant's label more prominently than anything else. It is not claimed that the words "sterilized milk" are anything more than truly descriptive matter incapable of exclusive appropriation. Similarity in colors and general arrangement are often held material factors in aiding deceit, but in a majority of the adjudicated cases the names used in connection therewith approach an idem sonans. Enoch Morgan's Sons Co. v. Whittier-Coburn Co. (C. C.) 118 Fed. 657; McLean v. Fleming, supra; Sterling Remedy Co. v. Spermine Medical Co., supra; Bauer & Co. v. La Société Anonyme, etc., 120 Fed. 74, 56 C. C. A. 480; Drewry & Son v. Wood (C. C.) 127 Fed. 887; Carbolic Soap Co. v. Thompson (C. C.) 25 Fed. 625; Franck v. Frank Chicory Co. (C. C.) 95

Fed. 818; Von Mumm v. Wittemann (C. C.) 85 Fed. 966; Centaur Co. v. Link, 62 N. J. Eq. 147, 49 Atl. 828.

Here, however, there is no hint of idem sonans in the names. The names being wholly different, sounding differently, and printed prominently in different colors and type, and the symbols being different with no marked resemblance other than that necessitated by the nature of the flowers, it is manifest that but for the appellant's use of the red and white bands no plausible claim of unfair competition could be advanced. But similarity in color alone is not sufficient to constitute an infringement. The primary colors are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress. It has frequently been held that as a rule, subject to certain exceptions when used in connection with other characteristics, a color cannot be monopolized to distinguish a product.

"The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest. Thus, by appropriating the colors, the manufacture of tipped matches could be monopolized by a few vigilant concerns, without any patent whatever. Indeed, it is customary for a large company like the defendant to issue many brands of matches, with heads of different colors. It is now making tipped matches. If, by appropriating two colors for each brand, it could monopolize them, it would soon take all the colors not in use by the complainant, and thus cover the entire field at once. For these reasons, we think the court below was in error in holding that the complainant had appropriated the colors of red and blue for the head of its tipped matches." Diamond Match Co. v. Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59.

See, also, Philadelphia Novelty Co. v. Rouss (C. C.) 40 Fed. 585; American Tobacco Co. v. Globe Tobacco Co., supra; New Orleans Coffee Co. v. American Coffee Co., 124 La. 19, 49 South. 730; Fleischmann v. Starkey (C. C.) 25 Fed. 127; Davis v. Davis (C. C.) 27 Fed. 490; Newcomer & Lewis v. Scriven Co., 168 Fed. 621, 94 C. C. A. 77; Mumm v. Kirk (C. C.) 40 Fed. 589; Regensburg & Sons v. Juan F. Portuondo

Cigar Mfg. Co., 142 Fed. 160, 73 C. C. A. 378; Heinz v. Lutz, 146 Pa. 592, 23 Atl. 314; Browne, Trade-Marks (2d Ed.) §§ 271, 272.

The case of Nokes v. Mueller, 72 Ill. App. 431, does not hold to the contrary, but merely emphasizes the exception. In that case the corresponding parts of the rival milk wagons were painted in precisely the same colors, and other characteristics, such as a picture of two cows, a running brook, and the inscriptions, were substantially the same. Moreover, the evidence there indicated that some persons were actually deceived.

[4] Undoubtedly in cases where simulation is not only so plain as to show an indisputable intention to deceive and is on its face obviously calculated to deceive, injunctions have been and should be issued without evidence of specific instances of actual deception. Von Mumm v. Frash (C. C.) 56 Fed. 830; R. Heinisch's Sons Co. v. Boker (C. C.) 86 Fed. 765; Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.) 109 Fed. 317; New England Awl & Needle Co. v. Marlborough Awl & Needle Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N. Y. Supp. 309; Boker v. Korkemas, 122 App. Div. 36, 106 N. Y. Supp. 904; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Burnett v. Hahn (C. C.) 88 Fed. 694; Kostering v. Seattle Brewing & Malting Co., 116 Fed. 620, 54 C. C. A. 76.

But again in most of such cases there is found an idem sonans in name in addition to color and arrangement of parts on the label or a close imitation in other particulars. We have been cited to but one case, where an injunction was granted, in which the color and arrangement of the offending label was not much more imitative than that complained of here, but in that case the color and type of the names "Fairbanks" and "Buffalo" were similar. Fairbank Co. v. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554. In that case, moreover, there was proof of specific instances of deception. No such evidence is found here. On the contrary, some 54 retail dealers who

handled both brands of condensed milk made affidavit that they had never known of a single instance of a retail purchaser or any one else being deceived. True, these dealers had only been handling the Wild Rose brand from one to six months, but it is evident that if purchasers were ever likely to be deceived, it would be at the start rather than later when the new brand had become better known. As said by the Supreme Court of Pennsylvania in Heinz v. Lutz, 146 Pa. 592, 608, 23 Atl. 314, 315:

"It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. It is not necessary to show that persons have been deceived, yet the finding of the master that no one has been deceived, although defendant's label has been in use for some time in the same vicinity as that of the plaintiff's, is certainly strong evidence in support of defendant's allegation that their label is not likely to deceive."

See, also, Kann v. Diamond Steel Co., 89 Fed. 706, 32 C. C. A. 324.

The same rule also prevails in England. London General Omnibus Co., Ltd., v. Lavell, 1 Chan. Div. 135; Payton & Co. v. Snelling, Lampard & Co. (1901) Appeal Cases, 308.

The last case cited involved competitive brands of coffee, one under the name of "Royal Coffee," and the other under the name "Flag Coffee," the latter contained in canisters with labels of colors, which it was claimed were calculated to deceive. Lord McNaghten said:

"In the next place, it is perfectly clear that no human being has been deceived. There is not a single instance of any person wishing to buy Royal Coffee buying Flag Coffee, instead through any mistake of any sort. Mr. Warmington accounted for that by saying, 'Oh, we were bound to institute proceedings at the earliest possible moment,' but if persons come to the court under an apprehension of that sort, they are still bound to make out their case. It will not do to say, 'We were frightened by what might happen, and therefore, you must stop the thing in limine.'

"The third thing which is perfectly clear on the evidence is this: That as regards the plaintiff's goods, if they have acquired a title and denomination in the market, the only title and denomination which they can have acquired is that of

Royal Coffee, while as regards the defendant's goods, if they have acquired or should acquire a title in the market, it is or will be the title of Flag Coffee."

So here there is no evidence that a single person has been deceived, and it seems clear that if the appellant's goods are ever to gain a title in the market, it must be as Wild Rose milk, and it will not and cannot be as Carnation milk. While there is in the case before us a manifest similarity in color scheme and grouping which could not be the result of mere coincidence, but evidences a design to imitate and appropriate respondent's taste in dress, which is not to be commended and may be justly characterized as ethically questionable, the differences are so many and so prominent as to negative a design to so imitate as to deceive by confusing identity or origin. The appellant's label could not deceive an intending purchaser of ordinary intelligence using reasonable caution, which is, after all, both on reason and authority, the only practical test. As said in Perlberg v. Smith, supra:

"Care must be taken in these cases not to extend the meaning of the word 'unfair' to cover that which may be unethical but is not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would, in many instances, be entirely legal."

And as said in Allen B. Wrisley Co. v. Iowa Soap Co., supra:

"Deceit is the basis of suits of this character. The intention to palm off one's goods as those of another, and the use of suitable means to effect that intention, are both essential elements of a good cause of action for unfair competition. The intention alone, without the actual or probable use of means calculated 'to convey a false impression to the public mind, * * * and to mislead and deceive the ordinary purchaser,' furnishes no ground for relief, because an intent to injure, where no injury is or will be inflicted, causes no legal damage."

The burden of proof was upon the respondent. From an inspection of the labels, we cannot say that that of the appellant is reasonably calculated to deceive. The uncontradicted evidence shows that no one has been deceived.

The judgment is reversed.

FULLERTON, CROW, MOUNT, and MAIN, JJ., concur.

APPENDIX C.

Partial Reproduction (one side only) of Exhibit 3 of the Answer.

The Choice ... Here are the famous
foods your customers reach for first!
ARMOUR
Armour Star Hams—America's Luxury Hams! Hand-picked ... sugar-cured ... tender-smoked! Armour Star Ready-to-Eat Ham—white and cedar red striped wrapper. Armour Star Smoked Ham—white and cedar red wrapper.
Armour Treet. Tender pork shoulder plus sugar-cured ham.
Armour Star Corned Beef Hash. Made Armour's new "fresh-cooked" way.
Armour Star Lard. Flavor-fresh, smooth, texturated. Self-measuring carton.
Mayflower Margarine. Made fresh daily. Fortified with Vitamin A.
Armour Star Bacon. America's Luxury Bacon! Hand-picked...sugar-cured...tender-smoked!
Armour Star Pork Sausage. Made fresh daily of only U. S. Government inspected pork.
Cloverbloom Cheese. Uniform quality, flavor, texture. All popular varieties.
Cloverbloom Eggs. Carefully refrigerated, candled and graded.
Cloverbloom Butter. Fresh as all outdoors! Uniform taste, quality.
Armour Star Shortening. Texturated —pre-creamed! Self-measuring carton.
Armour Star Frankfurters. Selected beef and pork—plus seasoning!
Armour Star Chili Con Carne. Uniform blending of beef, beans, spices.
Armour Star Chopped Ham. All ham. Cooked in the tin before cooking.
Shortening
MAYFLOWER
MAYFLOWER
OLEOMARGARINE
Bacon
Bacon
ARMOUR
CLOVERBLOOM
Cream Cheese
ARMOUR
Treet
Chili
Hash
ARMOUR
Ham
READY TO EAT
ARMOUR
SMOKED
Ham
COOK BEFORE EATING
Lard
CLOVERBLOOM
Butter
CLOVERBLOOM
Butter
PORK
Sausage
ARMOUR
Frankfurters
CLOVERBLOOM
Eggs
CLOVERBLOOM EGGS
ARMOUR
ARMOUR
Ham

APPENDIX D.

Reproduction of Armour Exhibit 600.

PEPPER POT SOUP
TOMATO SOUP
BEAN SOUP
ARMOUR
CORNED BEEF Hash
Chili CON CARNE
MILK